Docket No. 89-1688

IN THE UNITED STATES SUPREME COURT

October Term, 1989

GREGORY GATES,

Petitioner.

v

STATE OF MICHIGAN,

Respondent.

OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES SUPREME COURT

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QUESTION PRESENTED FOR REVIEW

WHETHER COLLATERAL ESTOPPEL, OUTSIDE THE FIFTH AMENDMENT DOUBLE JEOPARDY CLAUSE, PRECLUDES A CRIMINAL TRIAL WITH AN INDIVIDUAL CHARGED WITH SEXUALLY ABUSING HIS OWN DAUGHTER WHERE A PROBATE COURT JURY, INSTRUCTED THAT ITS ONLY CONSIDERATION IS WHETHER OR NOT THE HOME IS A FIT HOME FOR THE CHILD, RETURNED A "NO JURISDICTION" VERDICT.

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TABLE OF AUTHORITIES

CITATION OF THE OPINIONS AND JUDGMENTS DELIVERED IN THE COURTS BELOW

People v. Gates, 434 Mich. 146, 452 N.W.2d 627 (1990)

People v. Gates, 168 Mich.App. 384, 423 N.W.2d 668 (1988)

People v. Gates, Jackson County Circuit Court Number 86-41238-FH, released 12/3/86.

STATEMENT OF THE CASE

Pursuant to Rule 24.2, respondent accepts petitioner's statement of the case except for the following additions.

Petitioner and his wife, Deborah Lynn Gates, were married on November 21, 1981. (Probate Court Adjudication Hearing Transcript [PATr], p. 339). Their daughter, Nicole Gates, was born on March 29, 1982. (PATr, p. 61). The couple, however, separated on December 27, 1984. (PATr, p. 63). They became legally separated in February 1985, when the Jackson County Circuit Court having jurisdiction over their divorce awarded the couple joint custody of Nicole. (PATr, pp. 108-109). From then until February 13, 1986, petitioner had physical custody over Nicole every weekend. (PATr, p. 62). During most of this time, petitioner lived with his parents in

Michigan Center, Michigan, just East of Jackson. (PATr, p. 336).

After the Michigan Department of Social Services filed the petition against petitioner alleging abuse and neglect (having sexually abused Nicole), Nicole lived with her mother. (PATr, p. 109). Petitioner's visitation also ceased. (PATr, p. 109).

At the preliminary examination held in the criminal case on May 27, 1986, Nicole testified that, more than once, while she was staying at petitioner's parents' home in Michigan Center, petitioner had touched her on her vagina in such a way as to make it hurt. (Preliminary Examination Transcript [PETr], pp. 42-44). Petitioner told Nicole not to tell her mother because she would therefore not let him see her again. (PETr, p. 46).

In binding the case over to the Jackson County circuit court for trial, Michigan's

Twelfth District Court Judge Robert Crary, Jr., stated: "I do think that something happened that caused her to be upset and caused her father to indicate that it might keep her from seeing him again, which indicates, I'm afraid, a sexual contact to the touching which occurred at this time." (PETr, pp. 77-78).

At the probate court Adjudication Hearing, Nicole reiterated her preliminary examination testimony that she had gone to sleep and had woken up when petitioner had touched her on her vagina. (PATr, pp. 40-41). She once again testified that petitioner told her not to tell anyone. (PATr, pp. 42-43). She testified that petitioner had touched her about five times in all. (PATr, p. 42).

Catholic Social Services Therapist Karen Marie Dupage testified that, in her expert opinion, Nicole had been sexually molested. (PATr, pp. 189-194). She had

noticed a very marked mood change in Nicole. (PATr, p. 218). Nicole's mother also noticed a personality change. (PATr, pp. 64-65).

In addition to the instructions mentioned in petitioner's petition, the probate court also instructed the jury as follows:

> It is not necessary that each and every fact alleged in the petition be proven before you can find that the Court has jurisdiction of Nicole Gates. It is necessary, however, that sufficient facts be proven so that in your judgment you can find by a preponderance of the evidence that the home or environment of Nicole Gates was an unfit place for her to be by reason of neglect, cruelty, criminality, or depravity on the part of her father.

* * *

I do instruct you that this is a child protection case. It is not a criminal case. Therefore, the issue before you is not that of guilt or innocence but the issue is whether Nicole Gates comes within the jurisdiction of the Juvenile Division of the Jackson County Probate Court. You should not consider this proceeding to be in any way involved with the criminal law so far as your deliberations are concerned.

* * *

Now, there are only two possible verdicts in this kind of a case and I will give you a verdict form that gives you the two possible verdicts. You would either check the box on the top or the box on the bottom. The box on the top

says that the Court has jurisdiction of Nicole Gates. The box on the bottom says that the Court does not have jurisdiction of Nicole Gates, and you would check either one of those two boxes after you have reached a verdict. (PATr, pp. 431-432, 434, 436).

After the jury returned its no jurisdiction verdict, respondent, Guardian Ad Litem, and Nicole's mother's lawyer filed a motion for a judgment notwithstanding the verdict. On July 28, 1986, Jackson County Probate Court Judge Frederick O. Sill granted it. In making his ruling, he found that both Nicole Gates and Dupage had given reliable testimony. On the other hand, petitioner had not. Therefore, the only credible testimony presented was presented by respondent. (July 28, 1986, Probate Motion Hearing Transcript[28 Tr], pp.

10-11). Hence, because the jury's verdict was against the great weight of the evidence, Judge Sill entered an order granting a new trial. (28 Tr, p. 12).

This decision, however, was reversed by Jackson County Circuit Court Judge Gordon Britten on October 6, 1986. Petitioner had appealed to the Jackson County Circuit Court asking for leave to appeal and for a reversal. (Jackson County Circuit Court file number 86-42250-AV). In granting the application for leave to appeal and reversing Judge Sill's order granting the judgment notwithstanding the verdict, Judge Britten ruled that such a procedure denigrated petitioner's right to a trial by jury on the abuse and neglect petition. (September 26, 1986, Circuit Court Motion Hearing Transcript [26 MTr], pp. 12-13). He also found that, because the jury had no jurisdiction, Judge Sill did not have

jurisdiction to order the relief he had ordered. (26 MTr, p. 13).

ARGUMENT

BECAUSE COLLATERAL ESTOPPEL OUTSIDE THE FIFTH AMENDMENT DOUBLE JEOPARDY CLAUSE IS NOT A FEDERAL CONSTITUTIONAL DOCTRINE, PETITIONER'S CONSTITUTIONAL RIGHTS WERE NOT VIOLATED ESPECIALLY SINCE (1) GIVEN THE PROBATE COURT JURY'S INSTRUCTIONS, A FINDING THAT PETITIONER HAD NOT SEXUALLY ABUSED HIS DAUGHTER WAS NOT ESSENTIAL TO THE JUDGMENT AND (2) APPLYING COLLATERAL ESTOPPEL WOULD INCREASE CHILD MOLESTATION.

For three reasons, respondent asks this Court not to grant this petition for a writ of certiorari. First, petitioner is not presenting a federal constitutional claim to this Court. Because petitioner has never been criminally tried for this offense, double jeopardy does not bar trial. This Court has never ruled that the common law

doctrine of collateral estoppel, outside the Fifth Amendment Double Jeopardy Clause, is guaranteed by the United States Constitution. Second, the Michigan Supreme Court correctly ruled, given the jury instructions, that any finding that petitioner had not sexually abused his daughter was not essential to the judgment. The only issue presented to the probate court jury was whether or not Nicole's home was a fit home for her. By the time the trial was held, Nicole was living with her mother, not with petitioner. In fact, petitioner's visitation had ceased. Accordingly, the jury could have rationally found no jurisdiction even if it had believed that petitioner had sexually abused Nicole. Third, finding collateral estoppel will increase child molestation in Michigan. The Michigan courtrules require an adjudication hearing within 42 days of the petition if the child is taken out of the

home. Because 42 days is not long enough in which to hold a criminal trial, if collateral estoppel applies, at least some Michigan prosecutors will (as happened between the Michigan Court of Appeals' decision and Michigan Supreme Court's decision in this case) prevent the Michigan Department of Social Services from filing a petition taking the child out of the home. Hence, if in fact abuse has occurred, it will continue.

First, petitioner has not validly invoked this Court's jurisdiction. He is not presenting this Court with a federal constitutional claim. This Court has never ruled that the entire collateral estoppel doctrine is guaranteed by the United States Constitution. Every time this Court has applied collateral estoppel, it has done so in the context of the Fifth Amendment Double Jeopardy Clause. In Ashe v. Swenson, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469

(1970), Simpson v. Florida, 403 U.S. 384, 91 S.Ct. 1801, 29 L.Ed.2d 549 (1971), Harris v. Washington, 104 U.S. 55, 92 S.Ct. 183, 30 L.Ed.2d 212 (1971), and Turner v. Arkansas, 407 U.S. 366, 92 S.Ct. 2096, 32 L.Ed.2d 798 (1972), the criminal defendant had first actually been acquitted. In the present case, on the other hand, petitioner has never been acquitted of anything. Instead, a probate court jury, in a civil proceeding, returned a verdict of no jurisdiction over his daughter. The Double Jeopardy Clause is not implicated. Accordingly, petitioner is not alleging a Federal Constitutional violation.[1]

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[1]Respondent's point is graphically illustrated in Brown v. Ohio, 432 U.S. 161, 166, n6, 97 S.Ct. 221, 53 L.Ed.2d 187 (1977), where this Court characterized its ruling in Ashe, supra: "the Court [in Ashe] held that principles of collateral estoppel embodied in the Double Jeopardy Clause barred prosecutions of the accused for robbing the other victims."

In fact, this Court has specifically stated that the Double Jeopardy Clause does not apply unless both proceedings are criminal. In One Lot Emerald Cut Stones v. United States, 409 U.S. 232, 93 S.Ct. 489, 34 L.Ed.2d 438 (1972), the criminal defendant was first acquitted of the criminal charges against him. He then claimed that the subsequent forfeiture action was barred by the Double Jeopardy Clause. This Court unanimously disagreed stating:

> If for no other reason, the forfeiture is not barred by the Double Jeopardy Clause of the Fifth Amendment because it involves neither two criminal trials nor two criminal punishments. "Congress may impose both the criminal and civil sanctions in respect to the same act or omission; for the Double

> Jeopardy Clause prohibits merely punishing twice, or attempting to punish criminally the same offense."
>
> * * *
>
> Congress could and did order both civil and criminal sanctions, clearly distinguishing them. There is no reason for frustrating that design. Id. at 235-237.

The same is true in the present case. Michigan's abuse and neglect proceedings are not criminal in nature. Instead, they are civil. Michigan's Legislature has specifically provided for both remedies against child abuse. Not only may the State criminally prosecute someone who has sexually molested a child, but the State may also civilly take jurisdiction over the child in juvenile court and attempt to prevent future child abuse.

In fact, in Santosky v. Kramer, 455 U.S. 745, 764, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982), this Court ruled that a person has no double jeopardy defense against repeated State efforts to terminate his parental rights. The same would apply to the actual adjudication hearing itself.

Accordingly, because the first prooceding was only civil, the Double Jeopardy Clause does not apply. Because this Court has never extended collateral estoppel beyond the Fifth Amendment Double Jeopardy Clause, petitioner is not claiming that his federal constitutional rights were violated.[2] Respondent asks this Court not to expand federal jurisdiction over a doctrine that has never before been declared constitutionally required. Petitioner asks

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[2]Furthermore, the Michigan Supreme Court specifically decided not to address the Fifth Amendment Double Jeopardy Clause issue. 434 Mich. 154, n 6.

this Court not to so vastly expand federal constitutional jurisdiction in this country.

Second, the Michigan Supreme Court properly followed collateral estoppel doctrine by ruling that, after considering the jury instructions as given, under the facts of the case, any jury decision that petitioner had not sexually molested his daughter was not essential to the judgment. The Michigan Supreme Court correctly followed this Court's precedents for its ruling. In Cromwell v. County of Sac, 94 U.S. 351, 24 L.Ed. 195 (1877), this Court ruled that a reviewing court must look at what was actually litigated rather than what might have been litigated. Then, in Sealfon v. United States, 332 U.S. 575, 578-579, 68 S.Ct. 237, 92 L.Ed. 180 (1948), this Court ruled that the reviewing court must look at the jury instructions:

> Thus, the only question in this case is whether the jury's verdict

> in the [first] trial was a determination favorable to petitioner of the facts essential to conviction of the substantive offense. This depends upon the facts educed at each trial and the instructions under which the jury arrived at its verdict at the first trial.

In the present case, the probate court judge specifically told the jury that petitioner's guilt or innocence was not what it had to decide. (PATr, p. 434). Instead, the jury was to decide "by a preponderance of the evidence that the home or environment of Nicole Gates was an unfit place for her to be by reason of neglect, cruelty, criminality or depravity on the part of her father." (PATr, pp. 431-432). As the Michigan Supreme Court correctly found, because Nicole was no longer living with petitioner (and he did not even have

visitation anymore), the jury could have faithfully followed the jury instructions and yet rationally concluded that the probate court had no jurisdiction even though petitioner had sexually molested his daughter:

> The clear import of the [jury] instruction is that even if the jury believed that a criminal violation had occurred, it was not required to find the child's home or environment to be unfit so as to warrant jurisdiction. In short, a finding of innocence was not essential to a verdict of no jurisdiction; thus, the verdict did not "necessarily determine the issue of criminal guilt or innocence."

> Furthermore, during the course of the trial the jury learned that the child's mother had exclusive physical custody of the child and that visitations with her father had ceased. The jury might have concluded on that basis alone that the child did not require the protection of the probate court. Thus the jury's verdict could rationally have been based on grounds other than a determination of defendant's innocence of the allegations in the petition. 434 Mich. 159-160.

Petitioner cites to no cases which mandate a collateral estoppel preclusive effect even though the jury instructions allowed the jury to make a decision on other grounds. Instead, this Court, in Sealfon and Cromwell, ruled the opposite. Accordingly, there is no need for this Court to grant

this petition for writ of certiorari in this case.

Third, as the Michigan Supreme Court correctly found, for policy reasons, collateral estoppel should not apply in this situation. The Michigan Supreme Court did not want to increase child molestation in this State. Instead, it wanted to reduce it. Accordingly, as an alternative holding, it found no collateral estoppel. According to Michigan Court Rules 5.972, a family has a right to an abuse and neglect adjudication hearing with 42 days after the conclusion of the preliminary hearing if the child has been detained. Because criminal trials most likely will not be commenced within 42 days, to avoid the preclusive facts of a collateral estoppel rule, the prosecution (or maybe even the Probate Court Judge or even the Department of Social Services itself) may decide to block the probate court proceedings until after the criminal

trial. Thus, whether there has been abuse or not, the child will remain in the abusive parent's (or parents') care for that period. Such a result is certainly not in either the child's or society's best interest. Hence, the Michigan Supreme Court correctly found no collateral estoppel.

It ruled:

> The disparate purposes of the two types of proceedings argue strongly against the application of collateral estoppel. If we were to endorse the proposition that a determination of no jurisdiction in a child-protective proceeding operates to collaterally estop criminal charges, we would invite the risk that the proper functions of the two proceedings would be compromised.

* * *

To avoid the effect of collateral estoppel, if it were to be made applicable, a prosecutor would be required to develop criminal charges indicated by the petition and bring them to trial before a determination concerning jurisdiction could be reached in the probate proceeding. However, the burden of proving criminal charges beyond a reasonable doubt, added to problems presented by conflicting procedural and scheduling requirements of the two courts, would make it extremely difficult and often impossible for the criminal charges to be brought to trial in circuit court in advance of the jurisdiction determination in probate court.

> Thus, the petitioner or the prosecutor would face an unfortunate choice that is not in the public interest: whether to proceed on the petition in probate court because of concern for the child, or to delay the probate proceeding because of concern that a verdict of nonjurisdiction would preclude criminal prosecution of the accused.
>
> We are pursuaded by public policy considerations that such an election between criminal and child-protective proceedings should not be judicially imposed through the application of collateral estoppel. 434 Mich. 162-163.

As it is, the Michigan Supreme Court is not the only court that has refused to apply

collateral estoppel doctrines to preclude criminal prosecution for policy reasons. Other Courts refusing to apply collateral estoppel are: Joiner v. State, 500 So. 2d 81 (Ala. Crim. App. 1986); In re Kathryn & Kimberly B., 126 Misc.2d 1085, 484 N.Y.S.2d 788 (1985), Gregory v. Commonwealth, 610 S.W.2d 598 (Ky 1980); Commonwealth v. 707 Main Corp., 371 Mass. 374, 357 N.E.2d 753 (1976); State v. Alvey, 67 Haw. 49, 678 P.2d 5 (1984); State v Dupard, 93 Wash. 2d 268, 609 P.2d 961 (1980); People v Fagan, 66 N.Y.2d 815, 498 N.Y.S2d 335, 489 N.E.2d 222 (1985); State v. Walker, 159 Ariz. 506, 768 P.2d 668 (1989).

In fact, this Court itself has expressed reservations about applying collateral estoppel principles too strictly to preclude criminal prosecutions. Standifer v. United States, 447 U.S. 10, 100 S.Ct. 1990, 64 L.Ed.2d 689 (1980). Petitioner, on the other hand, has not even

addressed this point in his petition. He has completely ignored the Michigan Supreme Court's alternative holding. He is asking this Court to create a new constitutional right and then mechanically apply it even though Michigan would accordingly suffer more child molestation. Respondent asks this Court not to accept this invitation.

WHEREFORE, respondent asks this Court to deny this petition for writ of certiorari.

Respectfully submitted,

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